

**LAW OFFICES OF SOHNEN & KELLY**

**HARVEY SOHNEN, SBN 62850**

**PATRICIA M. KELLY, SBN 99837**

2 Theatre Square, Suite 230

Orinda, CA 94563-3346

Telephone: (925) 258-9300

Facsimile: (925) 258-9315

Attorneys for Plaintiff PEDRO ACERO,  
individually, and on behalf of all others  
similarly situated

**SEYFARTH SHAW LLP**

**MARK P. GRAJSKI (SBN 178050)**

**JULIE G. YAP (SBN 243450)**

400 Capitol Mall, Suite 230

Sacramento, CA 95814-4428

Telephone: (916) 448-0159

Facsimile: (916) 558-4839

**STATE COMPENSATION INSURANCE FUND**

**GINA MARIE S. ONG (SBN 204137)**

**JODY A. DEBERNARDI (SBN 139670)**

1750 E. Fourth Street, 5th Floor

Santa Ana, California 92705-3930

Telephone: (714) 347-6125

Facsimile: (714) 347-6145

**MEDINA MCKELVEY LLP**

**BRANDON R. MCKELVEY (SBN 217002)**

983 Reserve Drive

Roseville, CA 95678

Telephone: (916) 960-2211

Facsimile: (916) 742-5151

Attorneys for Defendant,  
STATE COMPENSATION INSURANCE FUND,  
a Public Enterprise Fund

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PEDRO ACERO and JAMES H. SAFARIAN,  
individually, and on behalf of all others  
similarly situated,

Plaintiffs,

vs.

STATE COMPENSATION INSURANCE  
FUND,

Defendant.

Case No. 4:14-cv-04928-YGR

**MEMORANDUM OF UNDERSTANDING  
REGARDING CLASS ACTION  
SETTLEMENT AGREEMENT AND  
RELEASE**

Judge: Hon. Yvonne Gonzalez Rogers  
Place: 1301 Clay Street  
Crtrm.1, 4<sup>th</sup> Floor  
Oakland, CA 94612

**I. INTRODUCTION**

This Memorandum of Understanding Regarding Class Action Settlement Agreement and Release (hereinafter “Settlement Agreement” or “Agreement”) is made and entered into by and between the following parties: Plaintiff Pedro Acero, individually and on behalf of all others similarly situated (“Plaintiff”), Defendant State Compensation Insurance Fund (“Defendant” or “State Fund”), and their respective counsel of record. This Settlement Agreement is subject to the terms and conditions set forth below and to the approval of the Court. This Settlement Agreement supersedes any and all prior memoranda of understanding and accurately sets forth the Parties’ class action and collective action settlement to resolve the class claims for alleged failure to pay overtime compensation under the Federal Labor Standards Act (“FLSA”), and/or related claims of alleged unfair competition, under California Business and Professions Code sections 17200, and/or related claims for violation of California Labor Code § 203, *et seq.*, as averred in the Second Amended Complaint on file in this action.

**II. DEFINITIONS**

1. Plaintiff and Defendant herein are collectively referred to as “the Parties.”
2. The “Action” means the lawsuit captioned above.
3. “California Class” means the class described in Paragraph 54 of this Agreement.
4. “California Class Member” means a member of the Class described in Paragraph 54 of this Agreement.
5. “California Settlement Class” means those persons who are members of the California Class who have not properly and timely opted out of the Action.
6. “California Settlement Class Member” means any person who is included in the California Settlement Class.
7. “Claim Form” means the form members of the Settlement Class are required to submit in order to establish their entitlement to recovery of a portion of the Net Settlement Fund.
8. “Class Counsel” means the Plaintiff’s Counsel after appointment as counsel for the Class by the Court.
9. “Class” means the California and FLSA Classes.



1           10.     “Class Member” means a member of the California and/or FLSA Classes.

2           11.     “Class Notice” means the Notice of Pendency of Class/Collective Action provided  
3 to Class Members.

4           12.     “Class Positions” means Loss Control Representatives, Loss Control Consultants,  
5 Loss Prevention Representatives<sup>1</sup>, Loss Prevention Consultants, Marketing Representatives, Broker  
6 Relationship Representatives, Group Insurance Consultants, Employer Service Representatives,  
7 Senior Loss Control Representatives, Senior Loss Control Consultants, Senior Loss Prevention  
8 Representatives, Senior Loss Prevention Consultants, Senior Marketing Representatives, Senior  
9 Broker Relationship Representatives, or Senior Group Insurance Consultants who worked on a  
10 full-time basis and regularly performed officially assigned duties outside of State Fund offices  
11 during the Settlement Period.

12           13.     “Class Period” means November 5, 2010 (for the California Class) and November 5,  
13 2011 (for the FLSA Class) through the date upon which the Court grants Preliminary Approval of  
14 the Settlement.

15           14.     “Class Representative” means Plaintiff Pedro Acero , who has been designated by  
16 Plaintiff’s Counsel as Class Representative for the Settlement Class.

17           15.     “Class Representative Service Award” means the sum to be paid to the named Class  
18 Representative as enhancement for his role as potential and actual Class Representative, and for the  
19 risks and work attendant to that role, and shall be paid from the Gross Fund.

20           16.     “Court” means the United States District Court for the Northern District of  
21 California or any other court taking jurisdiction of the Action.

22           17.     “Final Approval Hearing” means the hearing to be conducted by the Court to  
23 determine whether to finally approve and implement the terms of this Agreement, including a  
24 ruling on Plaintiff’s Counsel’s Fees and Costs and the Class Representative Service Award.

25           18.     “FLSA Class” means the class described in Paragraph 55 of this Agreement.

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28           <sup>1</sup> During the Class Period the positions that previously contained “Loss Control” in the title were changed to refer to  
“Loss Prevention.”

1           19.     “FLSA Class Member” means a member of the FLSA Class described in Paragraph  
2 55 of this Agreement.

3           20.     “FLSA Settlement Class” means those persons who have previously submitted an  
4 “opt-in” claim form in this Action and/or those persons who are members of the FLSA Class,  
5 receive a FLSA Notice, and who submit a valid Claim Form consenting to join the FLSA Class,  
6 consistent with the process described herein.

7           21.     “FLSA Settlement Class Member” means any person who is included in the FLSA  
8 Settlement Class.

9           22.     “Gross Fund” shall mean the principal amount of \$650,000.00, which is the  
10 maximum amount State Fund is required to pay, inclusive of the employer’s share of standard  
11 payroll tax requirements, the employee’s share of payroll tax requirements, Plaintiff’s Counsel’s  
12 Attorneys’ Fees and Costs, the amount of the Settlement Administration Expenses, and the amount  
13 of the Class Representative Service Award.

14          23.     “Judgment” means the Judgment and Order Regarding Final Approval of Class  
15 Action Settlement and Dismissal with Prejudice issued by the Court.

16          24.     “Net Settlement Fund” means the Gross Fund after deduction of Plaintiff’s  
17 Counsel’s Attorneys’ Fees and Costs, the amount of the Settlement Administration Expenses, and  
18 the amount of the Class Representative Service Award, and is the amount that will be apportioned  
19 to Settlement Class Members for Settlement Payments.

20          25.     “Opt-Out Class Member” means any person who submits a valid and timely request  
21 for exclusion from the California Class.

22          26.     “Plaintiff” means the named Plaintiff Pedro Acero in the Action, individually, and  
23 in his capacity as the party seeking to act as class representative.

24          27.     “Plaintiff’s Counsel” means the Law Offices of Sohnen & Kelly of Orinda,  
25 California.

26          28.     “Plaintiff’s Counsel’s Fees and Costs” means the amount that may be awarded to  
27 the attorneys for Plaintiff by the Court (or other Court taking jurisdiction of this matter) for  
28 prosecuting and settling the Action, including all attorneys’ fees, costs, and expenses.



1           29.     “Plaintiff’s Counsel’s Released Claim” means Plaintiff’s Counsel’s request for their  
2 fees and costs, which claims shall be released following payment of the Plaintiff’s Counsel’s Fees  
3 and Costs pursuant to the terms of this Agreement, including adoption of any potential structure  
4 arrangement for such payments.

5           30.     “Released Parties” means the same as “State Fund” or “Defendant” as that term is  
6 defined above in the opening of this Agreement and Defendant’s agents, insurers, attorneys,  
7 successors, and assigns.

8           31.     “Released State Law Claims” means any and all applicable state and local law  
9 claims, obligations, demands, actions, rights, causes of action, and liabilities against the Released  
10 Parties, of whatever kind and nature, character and description, that were alleged in the Second  
11 Amended Complaint of this Action, whether known or unknown, as well as similar claims that  
12 arise from the same factual predicate of the Action, Complaint, First Amended Complaint, or  
13 Second Amended Complaint, whether known or unknown, that exist from November 5, 2010  
14 through the date of entry of the Order of Final Approval by the Court. The Released State Law  
15 Claims include claims meeting the above definition under all applicable statutes, regulations or  
16 common law.

17           32.     “Released Federal Law Claims” means any and all federal law claims, obligations,  
18 demands, actions, rights, causes of action, and liabilities against the Released Parties, of whatever  
19 kind and nature, character and description, that were alleged in the Second Amended Complaint of  
20 this Action, whether known or unknown, as well as similar claims that arise from the same factual  
21 predicate of the Action, Complaint, First Amended Complaint, or Second Amended Complaint,  
22 whether known or unknown, that exist from November 5, 2010 through the date of entry of the  
23 Order of Final Approval by the Court.

24           33.     “Released Period” means November 5, 2010 through the date of entry of the Order  
25 of Final Approval by the Court.

26           34.     “Settlement” means the settlement of this Action and related claims effectuated by  
27 this Agreement.  
28

35. "Settlement Administration Expenses" means those expenses incurred by the Settlement Administrator in effectuating the Settlement.

36. "Settlement Administrator" means Dahl Administration, LLC or such other administrator mutually agreed upon by the Parties.

37. "Settlement Class" means the California and FLSA Settlement Classes.

38. "Settlement Class Member" means any person who is included in the California and/or FLSA Settlement Classes.

39. "Settlement Class Members' Released Claims" means those claims of the Settlement Class set forth herein that are released pursuant to the terms of the Agreement.

40. "Settlement Payments" means the amounts to be paid to individual Settlement Class Members.

41. "Settlement Period" means November 5, 2010 (for the California Class) and November 5, 2011 (for the FLSA Class) through the date upon which the Court grants Preliminary Approval of the Settlement.

42. "Settlement Effective Date" means the date by which all of the following have occurred: (i) this Settlement is finally approved by the Court; (ii) the Court's Judgment and Order Re Final Approval of Class Settlement and Dismissal with Prejudice ("Judgment") becomes Final; (iii) if there are no objections to the settlement, the date the Court's Judgment is entered; (iv) if there is an appeal of the trial court's final Judgment in the Action, the date of final affirmance on an appeal or the date of dismissal of such appeal; and (v) if there is a petition for writ of certiorari to the U.S. Supreme Court, the date of denial of such petition or the date of affirmance of the trial court judgment pursuant to such petition.

### III. LITIGATION BACKGROUND

43. On November 5, 2010, Plaintiff Pedro Acero filed a complaint seeking relief for himself individually and for a class of similarly situated individuals in California. The Complaint was initially filed in the United States District Court, Northern District of California, Case No. 4:14-cv-04928-YGR.



1           44.     The gravamen of the Complaint was that Defendant had failed to provide FLSA  
2 overtime compensation to employees who worked in certain field positions. Plaintiff Acero sought  
3 class-wide damages and restitution for pay allegedly due under the FLSA and/or California's  
4 Unfair Compensation laws, liquidated damages, statutory penalties for failure to timely pay  
5 compensation and wages in violation of California Labor Code § 203, interest thereon, injunctive  
6 relief, and costs and attorneys' fees. Prior to effecting service on State Fund, a First Amended  
7 Complaint was filed on December 1, 2014, alleging additional information about hours worked by  
8 Plaintiff Acero. In its Answer to the First Amended Complaint, Defendant denied Plaintiff's  
9 claims.

10           45.     A Second Amended Complaint was filed on June 25, 2015, adding Plaintiff Safarian  
11 as an individual Plaintiff and additional positions to the putative class and collective definitions.  
12 By stipulation the parties agreed that Plaintiff Safarian was to be dismissed as a Plaintiff from this  
13 Action and that he would not seek any Class Representative service award, but that he would  
14 remain a Class Member in this Action.

15           46.     In its Answer to the Second Amended Complaint, Defendant denied Plaintiff's  
16 claims.

17           47.     Since before the filing of the Action and through settlement, Plaintiff's Counsel has  
18 conducted a thorough investigation into the facts of this class action, including interviewing  
19 numerous witnesses and reviewing State Fund documents regarding the claims alleged in the  
20 lawsuit. The parties have also engaged in extensive discovery, including informal exchanges of  
21 information, production of documents by Defendant and Plaintiff Acero and Safarian, and the  
22 depositions of Plaintiff Acero and Safarian. Plaintiff's Counsel has reviewed and analyzed all  
23 discovery. In addition, Plaintiff's Counsel has interviewed approximately twenty-two (22)  
24 prospective Class Members.

25           48.     Three (3) Settlement Class Members, including Acero and Safarian, filed their  
26 consent forms opting into the FLSA Collective before July 6, 2015.

27           49.     The Parties participated in a mediation with Mark Rudy, an experienced  
28 employment law mediator, on July 6, 2015.

50. After a full day of arms-length negotiation on July 6, 2015, the parties agreed to the principle settlement terms.

51. It is the desire of the Parties to fully, finally, and forever settle, compromise, and discharge all disputes and claims against the Defendant arising from or related to the Action.

52. It is the intention of the Parties that this Settlement Agreement shall constitute a full and complete settlement and release of the claims by Settlement Class Members of the claims averred in the Action, as stated in Paragraph 93. This release includes in its effect a release of the Defendant, and a mutual release as between Plaintiff Acero and Defendant.

#### IV. JURISDICTION AND VENUE

53. This Court has jurisdiction over the Parties and the subject matter of this Action. This Court will have continuing jurisdiction over the terms and conditions of this Settlement Agreement, until all payments and obligations provided for herein have been fully executed.

## V. CLASS DEFINITION

54. The California Class shall be defined as and consist of “all persons who worked, full-time, as a Loss Control Representative, Loss Control Consultant, Loss Prevention Representative, Loss Prevention Consultant, Marketing Representative, Broker Relationship Representative, Group Insurance Consultant, Employer Service Representative, Senior Loss Control Representative, Senior Loss Control Consultant, Senior Loss Prevention Representative, Senior Loss Prevention Consultant, Senior Marketing Representative, Senior Broker Relationship Representative, or Senior Group Insurance Consultant by Defendant in California and who regularly performed officially assigned duties outside of State Fund offices at any time during the period on or after November 5, 2010 through date of entry of an Order of Preliminary Approval of this Settlement (the ‘California Settlement Period’).”

55. The FLSA Class shall be defined as and consist of “all persons who worked, full-time, as a Loss Control Representative, Loss Control Consultant, Loss Prevention Representative, Loss Prevention Consultant, Marketing Representative, Broker Relationship Representative, Group Insurance Consultant, Employer Service Representative, Senior Loss Control Representative, Senior Loss Control Consultant, Senior Loss Prevention Representative, Senior Loss Prevention



1 Consultant, Senior Marketing Representative, Senior Broker Relationship Representative, or Senior  
2 Group Insurance Consultant by Defendant in California and who regularly performed officially  
3 assigned duties outside of State Fund offices at any time during the period on or after November 5,  
4 2011 through date of entry of an Order of Preliminary Approval of this Settlement (the 'FLSA  
5 Settlement Period')."

6 56. Class Members entitled to recover under this Settlement Agreement will include  
7 only those individuals who are identified on Defendant's records as having worked as a Class  
8 Member during the Class Period, or those additional individuals who obtain a determination by the  
9 Settlement Administrator that they worked in that capacity notwithstanding the absence of  
10 Defendant's records confirming such employment.

11 57. Class Certification For Settlement Purposes. Defendant's position is that Plaintiff  
12 cannot establish the necessary elements for class certification for liability purposes. The California  
13 Class may be provisionally certified as a class action, however, for settlement purposes only  
14 pursuant to Federal Rules of Civil Procedure Rule 23(b)(3) to facilitate the monetary relief  
15 provided in this Settlement Agreement. Plaintiff Acero and his attorneys, the Law Offices of  
16 Sohnen & Kelly, may be preliminarily and conditionally appointed as Class Representative and  
17 Class Counsel, respectively.

18 58. Conditional Collective Certification. Defendant's position is that Plaintiff cannot  
19 establish the necessary elements for first stage or second stage conditional certification for liability  
20 purposes. The FLSA Class may be provisionally certified as a collective action, however, pursuant  
21 to 29 U.S.C. § 216(b) for settlement purposes only to facilitate the monetary relief provided in this  
22 Settlement Agreement. Plaintiff Acero, and his attorneys, the Law Offices of Sohnen & Kelly,  
23 may be preliminarily and conditionally appointed as Collective Representative and Collective  
24 Counsel, respectively.

25 59. Should, for whatever reason, the Settlement not become final, the fact that Plaintiff  
26 and Defendant were willing to stipulate to class and collective action certification as part of the  
27 Settlement shall have no bearing on, and shall not be admissible in connection with, the issue of  
28 whether a class or collective should be certified in a non-settlement context in this Action.

1 Defendant expressly reserves the right to oppose class and/or collective action certification should  
2 the Settlement not become final.

3 **VI. TERMS OF SETTLEMENT**

4 60. NOW, THEREFORE, in consideration of the mutual covenants, promises, and  
5 undertakings set forth herein, the Parties agree, subject to the Court's approval, as follows:

6 a. Scope. The Settlement described herein will resolve fully and finally all  
7 federal and state law claims, rights, demands, liabilities, and causes of action of every nature and  
8 description, that were alleged in the Second Amended Complaint of this Action, whether known or  
9 unknown, as well as similar claims that arise from the same factual predicate of the Action,  
10 Complaint, First Amended Complaint, or Second Amended Complaint, including but not limited to  
11 unpaid wages and overtime compensation, liquidated damages, restitution, penalties, interest,  
12 attorneys' fees and expenses, whether known or unknown, for the Released Period.

13 b. Non-Approval By The Court. In the event that this Settlement Agreement is  
14 not approved by the Court, fails to become effective, or is reversed, withdrawn or materially  
15 modified by the Court:

16 i. The Settlement Agreement shall have no force or effect;  
17 ii. The Settlement Agreement shall not be admissible in any judicial,  
18 administrative, or arbitral proceeding for any purpose or with respect to any issue, substantive or  
19 procedural;

20 iii. None of the parties to this Settlement Agreement will be deemed to  
21 have waived any claims, objections, defenses, or arguments with respect to the issue of class  
22 certification, collective certification, or the merits of Plaintiff's claims.

23 c. Settlement Amount. Subject to conditional class and collective action  
24 certification and Court approval, and in consideration for the release described in this Agreement,  
25 Defendant shall pay an amount not to exceed \$650,000.00 ("Gross Fund") to resolve the Action, as  
26 described more fully below. Within ten (10) days of entry of the Order Granting Final Approval,  
27 Defendant shall deposit the entirety of the settlement amount (\$650,000.00) into an escrow account  
28 established by the Settlement Administrator. The Gross Fund of \$650,000.00 shall be the sole



1 financial obligation of Defendant under this Agreement. The Gross Fund shall be used to satisfy  
 2 (1) the claims of all Settlement Class Members for all Released State Law Claims and all Released  
 3 Federal Law Claims, including but not limited to unpaid wages and overtime compensation,  
 4 liquidated damages, restitution, penalties, interest, attorneys' fees, costs, and expenses due or  
 5 claimed to be due at any time during Released Period, by all members of the Settlement Class; (2)  
 6 Settlement Administration Expenses; (3) Plaintiff's Counsel's Fees and Costs; (4) the employer's  
 7 share of the payroll taxes; (5) all Class Members' share of the payroll taxes; and (6) the Class  
 8 Representative Service Award. The Gross Fund will be distributed in accordance with the terms of  
 9 this Agreement. The Gross Fund shall be deposited in an interest-bearing escrow account selected  
 10 by the Settlement Administrator. Interest accruing on the Gross Fund while in escrow shall be  
 11 treated as, and revert in a like manner as, the Gross Fund principal amount.

12 d. Settlement Payments to Class Members. The Net Settlement Fund shall be  
 13 used to pay all amounts due to Settlement Class Members based on the distribution method set  
 14 forth below. The portion of the Net Settlement Fund payable to each Settlement Class Member  
 15 will be calculated as follows:

16 i. A portion of the Net Settlement Fund shall be allocated to the FLSA  
 17 Class (i.e., "all persons who worked, full-time, as a Loss Control Representative, Loss Control  
 18 Consultant, Loss Prevention Representative, Loss Prevention Consultant, Marketing  
 19 Representative, Broker Relationship Representative, Group Insurance Consultant, Employer  
 20 Service Representative, Senior Loss Control Representative, Senior Loss Control Consultant,  
 21 Senior Loss Prevention Representative, Senior Loss Prevention Consultant, Senior Marketing  
 22 Representative, Senior Broker Relationship Representative, or Senior Group Insurance Consultant  
 23 by Defendant in California and who regularly performed officially assigned duties outside of State  
 24 Fund offices at any time during the FLSA Settlement Period") in the amount of \$9.00 multiplied by  
 25 the total number of workweeks worked by the FLSA Class from November 5, 2011 to September  
 26 30, 2014 and in the amount of \$3.00 multiplied by the total number of workweeks worked by the  
 27 FLSA Class from October 1, 2014 through date of entry of an Order of Preliminary Approval of  
 28 this Settlement (hereafter referenced as the "FLSA Class Award"). The amount of this potential

1 award for each FLSA Class Member will be listed on the "Claim Form" as the "Estimated FLSA  
2 Class Award."

3                   ii.       The remaining portion of the Net Settlement Fund shall be disbursed  
4 to the California Settlement Class on a pro rata basis (hereafter referenced as the "California Class  
5 Award") based on the total number of workweeks worked by each California Class Member as  
6 described further below. Workweeks commencing on and after October 1, 2014 will be given one-  
7 third (1/3) the weight of the preceding workweeks in the California Settlement Period.

8                   iii.       In order for FLSA Class Members to receive their portion of the  
9 FLSA Class Award, they must opt in to the FLSA Settlement Class. The FLSA Class Members  
10 that opt in to the FLSA Settlement Class (hereafter referred to as "FLSA Opt Ins") will receive  
11 \$9.00 multiplied by the total number of workweeks they individually worked between November  
12 5, 2011 and September 30, 2014 and \$3.00 multiplied by the total number of workweeks they  
13 individually worked between October 1, 2014 and the date of entry of an Order of Preliminary  
14 Approval of this Settlement. FLSA Class Members who do not opt in to the FLSA Settlement  
15 Class will not receive a portion of the FLSA Class Award, but may fully participate in the  
16 California Class Settlement as described below, assuming they do not opt out of the California  
17 Class Settlement. The three (3) persons who have opted-in prior to this Agreement are included as  
18 opt-ins without being required to complete any further opt-in forms. If there is a portion of the  
19 total FLSA Class Award that goes undistributed, based on FLSA Class Members who do not opt in  
20 to the FLSA Settlement Class, the remaining portion of the FLSA Class Award will revert to the  
21 California Class Settlement and will be distributed as described below.

22                   iv.       The minimum potential Settlement share for each member of the  
23 California Class shall be calculated as follows: The California Class Award will be divided, on a  
24 pro rata basis, based on the total number of workweeks for which all California Class members  
25 worked, full-time, as a Loss Control Representative, Loss Control Consultant, Loss Prevention  
26 Representative, Loss Prevention Consultant, Marketing Representative, Broker Relationship  
27 Representative, Group Insurance Consultant, Employer Service Representative, Senior Loss  
28 Control Representative, Senior Loss Control Consultant, Senior Loss Prevention Representative,



1 Senior Loss Prevention Consultant, Senior Marketing Representative, Senior Broker Relationship  
 2 Representative, or Senior Group Insurance Consultant by Defendant in California and who  
 3 regularly performed officially assigned duties outside of State Fund offices at any time during the  
 4 California Settlement Period. Workweeks commencing on and after October 1, 2014 will be given  
 5 one-third (1/3) the weight of the preceding workweeks in the California Settlement Period. The  
 6 pro rata amount of this potential award for each individual California Class Member will be listed  
 7 on the "Claim Form" as the "Estimated California Class Award."

8 v. To calculate the actual Final California Class Award for each  
 9 member of the California Settlement Class, the Settlement Administrator shall determine the  
 10 number of members of the California Settlement Class (i.e. all California Class Members who have  
 11 not timely opted-out), then calculate the number of workweeks, on a pro rata basis, of all members  
 12 of the California Settlement Class (with weeks commencing on or after October 1, 2014 accorded  
 13 one-third (1/3) the weight of the preceding workweeks in the California Settlement Period), and  
 14 distribute the California Class Award, on a pro rata basis, to each member of the California  
 15 Settlement Class based on the pro-rata number of workweeks each California Class Member  
 16 worked.

17 vi. Notwithstanding this formula, the minimum payment to any  
 18 Settlement Class Member, whether a member of the FLSA Settlement Class, the California  
 19 Settlement Class, or both, shall be \$50.00.

20 vii. The number of workweeks worked by Settlement Class Members,  
 21 full-time, in one or more Class Positions shall be determined by the Settlement Administrator  
 22 based on employment records to be provided confidentially by Defendant as specified below.  
 23 Settlement Class Members shall have the right to challenge the number of workweeks reflected in  
 24 Defendant's records. After consulting with the parties, the Settlement Administrator shall make  
 25 final and non-appealable determinations as to any such challenges, and shall revise Class  
 26 Members' weeks worked numbers consistent with its determinations.

27 e. Attorneys' Fees and Costs. From the Gross Fund, Defendant has agreed to  
 28 pay, subject to Court approval, up to twelve thousand dollars (\$12,000.00) to resolve Plaintiff's